

LITIGATION AND BUSINESS LAW GROUP, INC.

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION**

P&H CASTERS COMPANY, INC.

Plaintiff,

v.

P&H INDUSTRIES, LLC. and GARY
HICKS;

Defendants.

) Case No.: 5:24-cv-01187-JGB-SPx

)

) **MEMORANDUM OF POINTS AND**

) **AUTHORITIES IN SUPPORT OF**

) **DEFENDANTS' MOTION TO**

) **DISMISS THE SECOND**

) **AMENDED COMPLAINT**

) **PURSUANT TO FRCP 12(B)**

)

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) **DATE: February 24, 2025**

) **TIME: 9:00 a.m.**

) **CTRM: 1**

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1 Defendants, P&H INDUSTRIES, LLC. (“PHI”) and GARY HICKS (“Hicks”)
2 (collectively “Defendants”) hereby offer their Memorandum of Points and Authorities in
3 support of their motion to dismiss the Second Amended Complaint of P&H Casters, Inc.
4 (“PHC” or “Plaintiff”).

5 **1.0 SUMMARY**

6 PHI and PHC signed a settlement agreement (the “Contract”) to resolve a prior
7 lawsuit entitled *P&H Industries LLC, a limited liability Company v. P&H Casters, Inc.*
8 *etc et al* (the “First Action”).¹ The Contract, which Plaintiff for strategic reasons elected
9 not to attach to the Second Amended Complaint (“SAC”), is clear and unambiguous. It
10 required Plaintiff to pay PHI a purchase price (“Purchase Price”) to acquire various assets
11 of PHI and provided that if Plaintiff was able to obtain certain tariff refunds for PHI that,
12 “... *does not result in any fines, taxes, penalties, claims, duties, and/or liabilities of*
13 *any kind to PHI, its officers, directors, members or representatives,*” then and only then
14 would Plaintiff be entitled to a credit against the Purchase Price. In other words, if the
15 tariff refunds were income then there would be no credit against the purchase price.
16

17 It is undisputed that Plaintiff did not procure a tariff refund for PHI and that the
18 refund PHI did receive at its own cost and expense was income and as a matter of law a
19 taxable event. Nevertheless, PHC has filed this lawsuit making spurious claims to an
20 offset against the Purchase Price. The entire lawsuit is without merit.

21 **2.0 FACTS**

22 On October 7, 2019, PHI filed a complaint against Plaintiff and others in the
23
24

25
26 ¹ Plaintiff failed to attach a copy of the Contract to the Complaint. It is attached to the Request for
27 Judicial Notice. In its previous order granting PHI’s motion to dismiss the First Amended
28 Complaint with leave to amend, this court took judicial notice of the Contract (Dkt. No. 35)

1 Superior Court of the State of California, County of Riverside entitled *P&H Industries*
2 *LLC, a limited liability Company v. P&H Casters, Inc. etc et al* (the “First Action”)(Dkt
3 No. 1 in United States District Court, Central District of California Case No. 5:20-cv-
4 00016-JKB-KK). Plaintiff removed the Action to this Court on January 3, 2020, with the
5 Action being assigned Case No. 5:20-cv-00016-JKB-KK. (Dkt No. 1).

6 In early June 2020, the parties resolved the Action through a written settlement
7 agreement (“Settlement Agreement”) and on June 8, 2020 filed a Stipulation for
8 Dismissal without Prejudice and Retention of Jurisdiction (“Stipulation”)(Dkt No. 40).
9 On June 17, 2020 the Court entered its order approving the Stipulation and dismissed the
10 Action (Dkt No. 41). A true and correct copy of the Settlement Agreement is attached
11 hereto as Exhibit 1 to the Declaration of Michael W. Kinney.
12

13 PHI filed a motion to dismiss the original complaint (Dkt. No. 15) which was
14 granted in part and denied in part with leave to amend. (Dkt 20). Plaintiff then filed a First
15 Amended Complaint (FAC) (Dkt. No. 21).

16 PHI filed a motion to dismiss various claims for relief in the First Amended
17 Complaint and a Request for Judicial Notice of the Contract which was not attached to the
18 FAC (Dkt No. 23 and 23-3). The court granted PHI’s motion in its entirety as well as its
19 Request to Take Judicial Notice of the Contract (Dkt. No. 35).² The court gave Plaintiff
20

21 ² In footnote 4 of its ruling the court held that “In a motion to dismiss under Rule 12(b)(6), a court may
22 consider “matters of judicial notice” without converting the motion into a motion for summary
23 judgment. *U.S. v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003). A court may take judicial notice of an
24 adjudicative fact not subject to “reasonable dispute,” either because it is “generally known within the
25 territorial jurisdiction of the trial court,” or it is capable of accurate and ready determination by resort to
26 sources whose “accuracy cannot reasonably be questioned.” *Fed. R. Evid.* 201. Proceedings of courts,
27 including orders and filings, are the proper subject of judicial notice when directly related to the case,
28 though not for the truth of the contents of the underlying documents. See *United States ex. Rel.*

1 leave to amend which has now resulted in the filing of the Second Amended Complaint
2 (“SAC”)(Dkt. No 36).

3 Relative to the claims raised in the SAC the Settlement Agreement provides as
4 follows:

5 “PHI agrees to credit against the Purchase Price any monetary government
6 payments received by PHI from any section 301 tariff/duty refund or any other
7 government program that PHC can obtain on behalf of PHI and *at no cost or*
8 *liability to PHI, after such payment(s) are received into PHI’s account and on the*
9 *condition that application for such government payment(s) and receipt of such*
10 *payment(s) imposes no financial obligations on behalf of PHI and does not result*
11 *in any fines, taxes, penalties, claims, duties, and/or liabilities of any kind to PHI,*
12 *its officers, directors, members or representatives.* PHI agrees to reasonably
13
14

15
16 Robinson Rancheria Citizens Council v. Borneo, Inc., 917 F.2d 244, 248 (9th Cir. 1992). Further,
17 “[c]ertain written instruments attached to pleadings may be considered part of the pleading. Even if a
18 document is not attached to a complaint, it may be incorporated by reference into a complaint if the
19 plaintiff refers extensively to the document or the document forms the basis of the plaintiff’s claim. The
20 defendant may offer such a document, and the district court may treat such a document as part of the
21 complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule
22 12(b)(6).” See United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) (citing See Fed. R. Civ. P.
23 10(c)). Although the Court agrees with Plaintiff that “[n]o settlement agreement was ever filed in court
24 in the [related] action and thus [] the settlement agreement [was] never a ‘court record,’” it is still
25 subject to judicial notice because Plaintiff’s claims are premised on Defendants’ alleged breach of the
26 Agreement. (See Opposition at 6 n.4; FAC.) As such the Agreement is subject to judicial notice.
27 Accordingly, the Court GRANTS the Def. RJN.
28

1 cooperate with PHC on efforts to obtain these benefits and provide information
2 about when such benefits have been received. (Emphasis supplied).”

3 Plaintiff through this new case contends that PHI has breached the Settlement
4 Agreement. Rather than seek to enforce the Settlement Agreement through the retention of
5 jurisdiction provisions of the Stipulation Plaintiff filed a new complaint, and now the SAC,
6 which is defective in multiple respects thereby necessitating this motion.

7 The parties tried without success to informally resolve this motion through a meet
8 and confer conference. (Declaration of Michael W. Kinney, ¶2).

10 **3.0 LEGAL ARGUMENT**

11 Rule 12(b)(6) provides for dismissal of an action for “failure to state a claim upon
12 which relief can be granted.” See FED. R. CIV. P. 12(b)(6). For a 12(b)(6) motion, “all
13 well-pleaded allegations of material fact [are accepted as true] and construe[d] in the light
14 most favorable to the non-moving party.” *Padilla v. Yoo*, 678 F.3d 748, 757 (9th Cir.
15 2012). “[C]onclusory allegations of law and unwarranted inferences” are insufficient.
16 *Associated Gen’l Contractors v. Metro. Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998).
17 A complaint must state “evidentiary facts which, if true, will prove [the claim],” *Kendall*
18 *v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008), otherwise it will be dismissed.
19 See *Watson v. Weeks*, 436 F.3d 1152, 1157 (9th Cir. 2006).

20 (“[T]he pleading must contain something more . . . than . . . a statement of facts
21 that merely creates a suspicion [of] a legally cognizable right of action”) (alteration in
22 original)); *Daniel v. County of Santa Barbara*, 288 F.3d 375, 380 (9th Cir. 2002) (““All
23 allegations of material fact are taken as true and construed in the light most favorable to
24 the nonmoving party.””) (quoting *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200
25 F.3d 661, 663 (9th Cir. 2000)). “[A] plaintiff’s obligation to provide the grounds of his
26 entitlement to relief requires more than labels and conclusions, and a formulaic recitation
27 of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 127 S. Ct.
28

1 544, 555 (internal quotations omitted). In construing the Twombly standard, the Supreme
2 Court has advised that “a court considering a motion to dismiss can choose to begin by
3 identifying pleadings that, because they are no more than conclusions, are not entitled to
4 the assumption of truth. While legal conclusions can provide the framework of a
5 complaint, they must be supported by factual allegations. When there are well-pleaded
6 factual allegations, a court should assume their veracity and then determine whether they
7 plausibly give rise to an entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129
8 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009). The more stringent pleading requirements of
9 Federal Rule of Civil Procedure 9(b) apply to allegations of fraud. “In alleging fraud or
10 mistake, a party must state with particularity the circumstances constituting fraud or
11 mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be
12 alleged generally.” Fed. R. Civ. P. 9(b). “Rule 9(b) requires particularity as to the
13 circumstances of the fraud – this requires pleading facts that by any definition are
14 ‘evidentiary’: time, place, persons, statements made, explanation of why or how such
15 statements are false or misleading.” *In re Glenfed, Inc. Securities Litigation*, 42 F.3d
16 1541, 1548 n.7 (9th Cir. 1994); see also *Moore v. Kayport Package Exp., Inc.*, 885 F.2d
17 531, 540 (9th Cir. 1989) (“A pleading is sufficient under rule 9(b) if it identifies the
18 circumstances constituting fraud so that a defendant can prepare an adequate answer from
19 the allegations. While statements of the time, place and nature of the alleged fraudulent
20 activities are sufficient, mere conclusory allegations of fraud are insufficient.”) (citing
21 *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987)).

22
23 Regarding claims arising from the breach of a contract, when the contract is not
24 attached, the court may consider the actual contract if it is presented to it (*Marder v.*
25 *Lopez*, 450 F.3d 445, 448 (9th Cir.2006) (observing that a court “may consider” evidence
26 that is incorporated by reference); *United States v. Ritchie*, 342 F.3d 903, 908 (9th
27 Cir.2003) (explaining that a document “may be incorporated by reference into a
28

1 complaint if the plaintiff refers extensively to the document or the document forms the
2 basis of the plaintiff's claim"). Additionally, in *Hamilton Materials, Inc. v. Dow*
3 *Chemical Corp.*, 494 F.3d 1203, 1207 (9th Cir.2007), the court explained that "Federal
4 Rule of Civil Procedure 12(b)(6) specifically gives courts the discretion to accept and
5 consider extrinsic materials offered in connection with these motions, and to convert the
6 motion to one for summary judgment when a party has notice that the district court may
7 look beyond the pleadings."

8 **3.1 THE SECOND CLAIM FOR RELIEF FOR PROMISORY FRAUD IS** 9 **BARRED BY THE LITIGATION PRIVILEGE**

10
11 "The elements of fraud, which give rise to the tort action for deceit, are (a)
12 misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of
13 falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance;
14 and (e) resulting damage." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) To
15 maintain any fraud action, a plaintiff must show that he or she changed position in
16 reliance upon the alleged fraud and was damaged by that change of position. (Civ. Code,
17 § 1709.) Whether based on state or federal law, a cause of action for fraud brought in
18 federal court must meet the requirements of Rule 9(b). *Vess v. Ciba Geigy Corp. USA*,
19 317 F.3d 1097, 1103 (9th Cir. 2003) "The requirement of specificity in a fraud action
20 against a corporation requires the plaintiff to allege the names of the persons who made
21 the allegedly fraudulent representations, their authority to speak, to whom they spoke,
22 what they said or wrote, and when it was said or written." *Tarmann v. State Farm Mut.*
23 *Auto. Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991). (citations omitted).

24 California Civil Code Section 47(b) renders as privileged a publication or broadcast
25 "[i]n any(1) legislative proceeding, (2) judicial proceeding, (3) in any other official
26 proceeding authorized by law, or (4) in the initiation or course of any other proceeding
27 authorized by law . . ." The section 47(b) privilege is "absolute" and "bars all tort causes
28 of action except a claim for malicious prosecution." *Hagberg v. California Federal Bank*

1 *FSB*, 32 Cal.4th 350). The “privilege applies to any communication (1) made in judicial
2 or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3)
3 to achieve the objects of the litigation; and (4) that have some connection or logical
4 relation to the action.” *Silberg v. Anderson*, 50 Cal.3d 205, 212 (1990).

5
6 The section 47(b) privilege “applies not only to judicial proceedings but to all
7 truth-seeking inquiries, including legislative and other official proceedings.” *Crowley v.*
8 *Katleman*, 8 Cal.4th 666, 695 (1994). The privilege is not limited to statements made
9 during trial or other proceedings “but may extend to steps taken prior thereto or
10 afterwards.” *Rusheen v. Cohen*, 37 Cal.4th 1048, 1057 (2006). The privilege “applies to
11 any publication required or permitted by law in the course of a judicial proceeding to
12 achieve the objects of the litigation, even though the publication is made outside the
13 courtroom and no function of the court or its officers is involved.” *Silberg*, 50 Cal.3d at
14 212.

15
16 A statement in a judicial proceeding is privileged if “it has some reasonably
17 relevancy to the subject matter of the action.” *Silberg*, 50 Cal.3d at 220.
18 “[C]ommunications made in connection with litigation do not necessarily fall outside the
19 privilege simply because they are, or are alleged to be, fraudulent, perjurious, unethical,
20 or even illegal. This is assuming, of course, that the communications are ‘logically
21 related’ to the litigation.” *Kashian v. Harriman*, 98 Cal.App.4th 892, 920 (2002). Doubts
22 as to application of the section 47(b) privilege are “to be resolved in favor of a finding of
23 privilege.” *Brody v. Montalbano*, 87 Cal.App.3d 725, 733(1978), cert. denied, 444 U.S.
24 844, 100 S.Ct. 87 (1979). Thus, the privilege has been applied to suits for fraud
25 (*Carden v. Getzoff* (1987) 190 Cal.App.3d 907; *Steiner v. Eikerling* (1986) 181
26 Cal.App.3d 639, 642-643, negligence and negligent misrepresentation
27 (*Pettitt v. Levy* (1972) 28 Cal.App.3d 484, 487
28

1 “California courts and the California legislature have long recognized that any
2 alleged communications made during or in connection with judicial proceedings—
3 including arbitration—are absolutely privileged. Such communications may not form the
4 basis of any subsequent claim against the proponent. ‘For well over a century,
5 communications with ‘some relation’ to judicial proceedings have been absolutely
6 immune from tort liability by the privilege codified as section 47(b).” *Rubin v. Green*, 4
7 Cal.4th 1187, 1193 (1993)” *Rasidesch v. Midland Credit Management, Inc.* (2007) 496 F.
8 Supp 2d 1155, 1159).

10 Important is that communications do not need to be made inside a courtroom.
11 *Home Ins. Co. v. Zurich Ins. Co.*(2002) 96 Cal.App.4th 17, 24 (See also: *Herterich v.*
12 *Peltner*, (2018) 20 Cal. App. 5th 1132, 1139; “The privilege extends to any publication
13 required or permitted by law in the course of a judicial proceeding to achieve the objects
14 of the litigation, even if the publication occurs outside the courtroom in the absence of a
15 court function or the court's officers. (*Gallanis-Politis v. Medina* (2007) 152 Cal App 4th
16 600, 616)....For policy reasons, even malicious or fraudulent communications are
17 privileged under Civil Code section 47, subdivision (b).(Citations omitted).”)

19 The litigation privilege applies to bar claims for fraud. (“the privilege has been
20 applied to suits for fraud, negligence and negligent misrepresentation.” *Home Ins. Co. v.*
21 *Zurich Ins. Co.*at 22 (See also *Seltzer v. Barnes* (2010), 182 Cal.App.4th 953, 970). “The
22 litigation privilege extends to fraudulent statements, even when made to a court, if they
23 were made in furtherance of litigation. (*Boston v. Nelson* (1991) 227 Cal. App. 3d. 1502,
24 1507 [intentional misstatements and misleading statements by attorney to trial court were
25 privileged because made in furtherance of litigation]. Moreover, as the California
26 Supreme Court stated, “the only exception to [the] application of section 47(2) [now
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1 section 47(b)] to tort suits has been for malicious prosecution actions. (*Silberg v.*
2 *Anderson*, 50 Cal.3d 205, 212 (1990)).

3
4 Finally, the litigation privilege applies to out of court communications made in
5 settlement discussions. (*Home Ins. Co. v. Zurich Ins. Co.* at 22; *Seltzer v. Barnes* (2010),
6 182 Cal.App.4th 953, 970).

7 In *Home Ins. Co. v. Zurich Ins. Co.*, *supra*, insurance carrier brought action against
8 automobile liability insurer to recover for fraudulently misrepresenting liability coverage
9 limits to induce settlement of tort claim. The court sustained the demurrer without leave
10 to amend and the carrier appealed. Appellate court upheld the dismissal with prejudice. In
11 so doing the court held that, “Despite its explicit wording, the privilege described
12 by section 47(b) has been given expansive application by California courts. Although
13 originally enacted with reference to defamation actions alone [citation], the privilege has
14 been extended to *any* communication, whether or not it is a publication, and to *all* torts
15 other than malicious prosecution. [Citations.] Thus, the privilege has been applied to suits
16 for fraud, negligence and negligent misrepresentation , and interference with contract
17 [citation].” Id at 22.

18 The court then held that, “the litigation privilege applies to the statement alleged as
19 the basis of Home's fraud action as the statement meets the four criteria of the “usual
20 formulation.” The statement was made in a judicial proceeding. “The privilege attaches
21 even though the publication was made outside a courtroom, as many portions of a
22 ‘judicial proceeding’ occur outside of open court. [Citations.]” (Citations omitted) The
23 statement meets the third and fourth criteria as it was made to induce settlement of
24 Pinasco and Main's lawsuit against Canfield.”

25 Based on the four corners of the Second Amended Complaint it is apparent that
26 this case is on all fours with *Home Ins. Co. v. Zurich Ins. Co.* The alleged fraudulent
27 statements were made in a judicial proceeding (specifically a lengthy mediation), though
28 outside a courtroom, by the litigants (Gary Hicks and PHI), to achieve settlement which

1 has a clear connection to the objects of the litigation. The privilege clearly applies and the
2 fraud claim should be dismissed.

3 The court in *Seltzer v. Barnes* (2010), 182 Cal.App.4th 953, 970, on essentially the
4 same set of facts, reached an identical conclusion to the court in *Home Ins. Co. v. Zurich*
5 *Ins. Co.* in dismissing an action for fraud based on alleged fraudulent statements in
6 settlement negotiations. It is absolutely clear that the litigation privilege applies here and
7 the fraud claim must be dismissed with prejudice.

8 Of further note is that the court in *Home Ins. Co. v. Zurich Ins. Co.* held that,
9 reliance on the representation of available policy limits by counsel was unreasonable as a
10 matter of law because such representation was absolutely privileged under the litigation
11 privilege. Accordingly, the court held no claim for fraud could possibly exist. Id at 22.
12 The exact same rationale applies here and the fraud claim is barred by the litigation
13 privilege and lack of justifiable reliance.

14 **3.2 THE BREACH OF CONTRACT CLAIM FAILS AS A MATTER OF**
15 **LAW.**

16 As a matter of law, a tariff refund is income to the receiving party and is thus a
17 taxable event. The breach of contract claim is entirely based on the alleged predicate fact
18 that Plaintiff was to receive a credit and/or payment from PHI equal to the amount of any
19 tariff refund. This, however, is false. Plaintiff was only entitled to receive a credit against
20 the amounts it was to pay if and only if the receipt of the tariff refund was not a taxable
21 event. In other words, if it was not income.

22 It is unassailable that the tariff refund was income to PHI (Request for Judicial
23 Notice, IRS Publication 525, p.23). As a matter of law, income of a limited liability
24 company is passed through to its member and if it is a single member limited liability
25 company it is treated as a disregarded entity. (Request for Judicial Notice, IRS
26 Publication 3402, p.2).

27 Plaintiff concedes that Gary Hicks is the sole member of PHI (Dkt. No. 36, p3,
28 lines 14-15. Thus, as a matter of law, PHI is treated as a disregarded entity and the tariff

1 refund is income to Gary Hicks and results in a tax liability. The receipt of the refund
2 income thus created tax and liability owing by Gary Hicks to the Internal Revenue
3 Service and State of California.

4 The Contract makes clear that a credit is due to Plaintiff if and only if a tariff
5 refund “*does not result in any fines, taxes, penalties, claims, duties, and/or liabilities of*
6 *any kind to PHI, its officers, directors, members or representatives.*” Therefore, by the
7 express terms of the Contract negotiated throughout a lengthy mediation no credit or
8 refund is due to Plaintiff thereby rendering the breach of contract claim meritless. It
9 should be dismissed with prejudice.

10 Dated : January 13, 2025 LITIGATION AND BUSINESS LAW GROUP, INC
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12
13 *Michael Kinney*

14 _____
15 Michael W. Kinney, attorney for Defendants
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system January 13, 2025.

Dated: January 13, 2025

s/Michael W. Kinney/

Michael W. Kinney, attorney for Defendants